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IN THE

Supreme Court of The United States

OCTOBER TERM, 1966

No. 1158

JOSEPH J. HURST

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION OF JOSEPH J. HURST FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled case on January 5, 1967, and the order of said Court denying Petitioner's Petition for Rehearing entered February 16, 1967.

OPINION BELOW

Copies of the judgment of the Court below and its order on Petition for Rehearing are attached hereto as Appendix A.

JURISDICTION

The date of the judgment of the Court of Appeals sought to be reviewed is January 5, 1967; the date of the order of the Court of Appeals denying Petitioner's Petition for Rehearing is February 16, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the indiscriminate use of hidden tape recorders and concealed microphones violated Petitioner's right to be free from unlawful search and seizure and his right of privacy under the Fourth and Fifth Amendments to the Constitution of the United States.

2. Whether the indiscriminate use of hidden microphones and midget tape recorders by federal agents violated defendant's right to fair play and substantial justice as traditionally defined and enforced by the federal judiciary.

STATEMENT OF THE CASE

Joseph J. Hurst, Petitioner, and three others were jointly indicted in a fifteen-count indictment charging conspiracy under 18 U.S.C. § 371 (1958), to violate the Internal Revenue laws by conspiring to sell non tax-paid whiskey, and under Int. Rev. Code of 1954, §§ 5179(a), 5601(a), 5173, 5602, 5202(a)(2), 7206(4),

5691(a), 5180, 5681(c), for selling non tax-paid whiskey. All four defendants were tried at the September Term, 1963 of the United States District Court for the Middle District of Georgia, Columbus Division and all four were convicted.

Petitioner alone appealed his conviction on Counts 1, 3, 9 and 11, Count 1 being a charge of conspiracy and Counts 3, 9 and 11 each charging a sale of non tax-paid whiskey. On appeal, the Court of Appeals for the Fifth Circuit reversed the conviction of Petitioner and remanded the case for a new trial. *Hurst v. United States*, 337 F.2d 678 (1963).

At the March Term, 1965 of the United States District Court for the Middle District of Georgia, Petitioner was again placed on trial under Counts 1, 3, 9 and 11, and the jury returned a verdict of guilty as to Counts 1 (conspiracy) and 9 (selling non tax-paid whiskey) and not guilty as to Counts 3 (selling non tax-paid whiskey) and 11 (selling non tax-paid whiskey).

On appeal, the Court of Appeals for the Fifth Circuit affirmed, and Petition for Rehearing was denied.

The evidence against Petitioner consisted almost entirely of the sayings and doings of several agents of the Treasury Department Alcohol Tax Unit, in which the key role was played by an undercover informer, one Kennington. This informer had previously been personally acquainted with Petitioner in regard to the illicit liquor business, was widely known to have been trafficing in non tax-paid whiskey for a period of some thirty (30) years, and had been convicted of liquor violations "four or five times." (R.38) Petitioner had, at one time, prior to the times here relevant, posted

bond for Kennington after Kennington had been arrested on a liquor violation.

On or about March 9, 1963 a plan was put into effect by several agents of the Alcohol Tax Unit to investigate "rumors" (R.226) that Petitioner was involved in an illicit whiskey operation in Quitman County, Georgia. The plan was carried out by engaging the informer described hereinabove to go to Georgetown, Quitman County, Georgia, and gather evidence, in concert with the agents, to "present on Mr. Hurst in the trial of a case. . . ." (R.226)

Pursuant to this arrangement, Kennington made eleven trips to Georgetown, usually in company with an Alcohol Tax agent, during the period March 9 through June 6, 1963. The informer contacted Petitioner on seven of these trips — on six occasions at Petitioner's home, generally at night and after he had gone to bed. The other meeting was coincidental, taking place on the street in Georgetown.

At no time did Petitioner attempt to make contact with the informer or the agents, and on every occasion the conversations regarding illicit whiskey were initiated by the informer or the agent. (Appendix)

On the first planned meeting with Petitioner, April 22, 1963, Kennington and Alcohol Tax Agent Allred arrived at Petitioner's house in Georgetown on or about nine p.m., carrying concealed in their car a midget tape recorder. Upon being asked by the informer whether he had found him any "stuff," Petitioner replied that he thought Bennett might, and agreed to show them where Bennett lived. As Petitioner got into the agent's automobile, the tape recorder was started. Dur-

ing the course of the drive, the following colloquy was recorded in regard to "guarantees" in Quitman County:

MR. KENNINGTON:

. . . He wanted to guarantee me to the Russell County line for 50 cents extra and I agreed to do it but you know how his guarantee was, don't you?

MR. HURST:

Hell, his guarantee was worthless. I wouldn't —

MR. KENNINGTON:

I wouldn't believe him, nothing he says.

MR. HURST:

He's got no way to guarantee, couldn't guarantee nobody out of the yard.

MR. KENNINGTON:

That's right. But you know whenever —

MR. HURST:

I can guarantee you in Quitman County if don't nobody know it but the Sheriff. (R.269)

On May 6, 1963, Kennington again went to Petitioner's home, late at night, and upon finding Petitioner in bed, entered his bedroom and again asked if Petitioner had "found me anything yet." (R.145) At the time the informer entered Petitioner's bedroom, he was wearing a concealed microphone which was broadcasting his and Petitioner's conversation to three

agents listening in a car several blocks away. (R.148)

Again on May 20, 1963, Kennington entered Petitioner's bedroom around eleven p.m. with a radio transmitter concealed upon his person, broadcasting to two agents in a car near by. (R.182-83, R.189)

On June 6, 1963 agent Allred entered Petitioner's bedroom after he had gone to bed with a transmitter concealed upon his person.

At the trial, the tape recording made without Petitioner's knowledge on April 22, 1963 was introduced into evidence over Petitioner's objection and was played to the jury. (R.256-83) Likewise, the conversation between Kennington and the Petitioner which took place on May 20, 1963 was admitted into evidence through the testimony of agent Graham who monitored the radio utilized while the informer was broadcasting from Petitioner's bedroom. (R.189)

REASONS FOR GRANTING THE WRIT

1.

The decision of the Court below represents a marked departure from the rationale of recent cases involving the introduction of surreptitiously acquired tape recordings into evidence in criminal cases and is grounded upon a decision of this Court which was in error when decided, and which has been robbed of all its vitality by subsequent authority and technological change. The Court below relied heavily upon *On Lee v. United States*, 343 U.S. 747 (1952), a decision which a majority of this Court tacitly disapproved in *Lopez v. United States*, 317 U.S. 427 (1963), and which was specifically repudiated by the Concurring and Dissent-

ing Opinions in that case. Such reliance has resulted in a further clouding of the law as it relates to the rights of criminal defendants under the Fourth Amendment, and completely ignores monumental changes in society and technology which have occurred since 1952.

The law, in this area, is largely set forth in three decisions of this Court — *On Lee v. United States*, 343 U.S. 747 (1952); *Lopez v. United States*, 373 U.S. 427 (1963); and *Osborn v. United States*, 17 L. ed 2d 394, 400 (1966). Of these decisions, *On Lee* and *Lopez* are both 5-4 decisions and *Osborn* can be limited to its peculiar facts. In addition, four members of the Court have specifically expressed the opinion that *On Lee* should be overruled, *Lopez v. United States, supra*, at 472 (Warren, C. J. concurring) and 475 (Brennen, J. dissenting), and the majority failed to rely on *On Lee* in affirming *Lopez*, when that case, *if it had retained any vitality* would have controlled. Thus, there is need for clarification of the status of *On Lee* as precedent, and for the formulation of a workable rule of law in an area which technological advance has turned into a nightmare of "Big Brother-ism" and sophisticated eavesdropping undreamed of a decade ago.

The instant case, for the first time since the decision in *On Lee*, clearly draws the issue as to whether governmental authority is to be given *carte blanche* in the use of hidden electronic devices, or whether there is to be established a "procedure of antecedent justification before a magistrate that is central to the Fourth Amendment" as "a precondition of lawful electronic surveillance." *Ohio ex rel Eaton v. Price*, 364 U.S. 263, 272 (1960) (Separate opinion), quoted in *Osborn v. United States*, 17 L. ed 2d 394, 400 (1966).

The first case in point of time to deal with the specific question here under consideration was *On Lee v. United States, supra.* In that case, Petitioner was convicted of selling and of conspiring to sell opium in violation of the laws of the United States and his conviction was upheld by the Court of Appeals. On certiorari, the Petitioner contended, *inter alia,* that his rights under the Fourth Amendment had been violated by the admission into evidence of two conversations which Petitioner had with one Chin Poy under the following circumstances:

Chin Poy, an old acquaintance and ex-employee, entered Petitioner's laundry and engaged him in conversation in the course of which Petitioner made incriminating statements. Petitioner did not know that Chin Poy was an informer in the pay of the Government or that he carried a miniature microphone which was broadcasting the conversation to an agent outside the laundry. A few days later on the sidewalks of New York another conversation took place between the two, and damaging admissions were again "audited" by the agent.

Upon trial, defendant objected to the admission of his conversations into evidence on the ground that the admission of such evidence would violate both the search and seizure provisions of the Fourth Amendment and Sections 605 of the Federal Communications Act. He further contended that even if said evidence were not rejected on those grounds, that the Court should pronounce it inadmissible under the judicial power to require fair play in Federal law enforcement.

On certiorari, five members of the Court, in an opinion by Justice Jackson, held that the use of a secret

electronic microphone to broadcast a conversation, unknown to defendant, to another person did not violate the constitutional immunity of the accused from unreasonable searches and seizures. Mr. Justice Black, dissenting, thought the evidence should have been rejected on the ground of fair play. Mr. Justice Douglas dissented on the ground that earlier decisions of the Court that wire tapping by federal officers was not a violation of the Fourth and Fifth Amendments, should be overruled and any evidence obtained by invasion of privacy should be rejected. Justice Frankfurter, dissenting, expressed disapproval of the wire tapping cases and thought that in any event the doctrine should not be extended. Justice Burton, with the concurrence of Justice Frankfurter, dissented on the ground that the surreptitious transmission of a private conversation amounted to an unreasonable search and seizure.

The majority in *On Lee* based its affirmance of the conviction on the narrow, technical ground that no trespass had been committed in the obtaining of the evidence, since the laundry in which the conversations took place was a facility open to the public and Chin Poy was there with the defendant's permission. In the absence of trespass in the obtaining of the evidence, the Court saw no violation of defendant's rights under the Fourth Amendment. There was no consideration by the Court of the possibility that the mere *use* of hidden listening devices could under certain circumstances run afoul of the Constitution. In other words, the focus of the Court's attention in *On Lee* was upon the method used in *positioning* the device only. No other circumstances were deemed to be relevant.

The trespass criterion applied in *On Lee* was enun-

ciated in *Olmstead v. United States*, 316 U.S. 438 (1928) a wire tapping case, and was subsequently applied in *Goldman v. United States*, 316 U.S. 129 (1942), a case which involved a listening device attached to the outside wall of an office. When *On Lee* was decided these cases were deemed to control.

One of the principal points relied upon by the Court in *Olmstead* was the nature of the evidence. The Court found that the Fourth Amendment extended only to "*things*", and that telephone conversations were not "things". Thus, it followed that the Fourth Amendment became involved only in the *methods* used to install the listening device rather than the use of such device.

In the years since *Olmstead*, the Court has effectually destroyed the entire underpinning of that case, See *Irvine v. California*, 347 U.S. 128 (1954); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Lopez v. United States*, 373 U.S. 427, 483 (1963) (dissenting opinion), and has expressly held that an actual trespass need not be shown in order to support a violation of the Fourth Amendment. *Silverman v. United States*, 365 U.S. 505 (1961).

Although the Court considered numerous cases involving the Fourth Amendment in the interim, it was not until 1963 that the occasion arose to reexamine the rationale of *On Lee*.

In *Lopez v. United States*, 373 U.S. 427 (1963) the defendant was convicted of attempting to bribe an Internal Revenue agent. The agent reported the attempted bribe to his superior and was instructed to return and "pretend to play along with the scheme."

Before his second visit the agent was equipped with a pocket transmitter (which subsequently failed to work) and a miniature wire recorder, which recorded his conversation with defendant during the course of which defendant made incriminating statements. The recording was admitted into evidence at the trial over defendant's objection that the recording was obtained in violation of his rights under the Fourth Amendment.

On appeal, defendant's conviction was affirmed.

On certiorari, the Supreme Court affirmed. In an opinion by Mr. Justice Harlan expressing the views of five members of the Court, it was held, *inter alia*, that the wire recording of the conversation was properly admitted into evidence, since the recording device was used only to obtain the most reliable evidence possible of the conversation and that no one heard the conversation who was not intended to hear it.

The majority in *Lopez* gave passing notice to *Olmstead, supra* and *Goldman, supra,* but stated at 470: "The validity of these decisions is not in question here." The Court then distinguished *Olmstead* and *Goldman* on the ground that *Lopez* was not an "eavesdropping" case. The Court stated that "the Government did not use an electronic device to listen in on conversations it could not otherwise have heard". Based on this finding the Court held that the defendant waived his rights under the Fourth Amendment, since he "took the risk that the offer [to bribe] would be accurately reproduced in court, whether by faultless memory or mechanical recording". 373 U.S. at 471.

It is significant that *On Lee* was cited only once in the majority opinion and then with a "See" cite to

support the proposition that fraudulent entry did not constitute trespass.

Mr. Chief Justice Warren concurred in the result, but expressed the view that *On Lee v. United States*, which he felt was reaffirmed in the Court's opinion, had been incorrectly decided and should not be revitalized.

The opinion of Mr. Chief Justice Warren seems to assert that there exists a line, in the use of hidden electronic devices, beyond which law enforcement officials cannot constitutionally go, and that this line falls somewhere between the action taken in *On Lee* and that taken in *Lopez*. Specifically, Mr. Chief Justice Warren stated at 472:

> "Indiscriminate use of such devices raises grave constitutional questions under the Fourth and Fifth Amendments . . ."

The Concurring Opinion does not, however, go so far as to suggest that all electronic surveillance must be conducted under judicial supervision.

The Dissenting Opinion in *Lopez* is lengthy and exhaustive, in its discussion of authority and the development of the law in this area. The heart of the opinion seems to be found in the following statement:

> "Until the Court holds inadmissible the fruits of an electronic search made as in the instant case, *with no attempt whatever to comply with the requirements of the Fourth Amendment*, there will be no incentive to seek an imaginative solution whereby the rights of individual liberty and the needs of law enforcement are fairly accommodated." (Emphasis added.)

373 U.S. at 486.

In analyzing the foregoing statement, and interpreting the injunction that law enforcement officers must "attempt" to comply with the requirements of the Fourth Amendment, it seems evident that the minority envisions a necessity for some type of judicial or magisterial supervision of electronic surveilance by law enforcement agencies if such activities are not to run afoul of the Constitutional guarantees. This interpretation is consistent with the minority's discussion of the feasibility of framing a warrant for electronic surveilance. 373 U.S. at 485-86.

In this regard, it is significant that *Osborn v. United States*, 17 L. ed 2d 394 (1966), was affirmed by the full Court.[1] That case involved the use of a tape recorder concealed on the person of an informer, and a recording of an attorney proposing to tamper with a prospective federal juror. The evidence showed that the informer had reported the initial offer of the defendant to the Justice Department and pursuant to a sworn affidavit from the informer the F.B.I. had obtained a court order authorizing the use of the recorder to verify the informer's story. Thus, it seems that all members of the Court are agreed that the Fourth Amendment is not violated by electronic surveilance where such surveilance has prior magisterial approval.

It is apparent that both *Lopez* and *Osborn* are grounded on concepts radically different from the formalism and fiction of *On Lee*, *Olmstead* and *Goldman*. Possibly when those cases were decided the trespass distinction had some merit. In 1967 however,

[1]Mr. Justice White took no part in the consideration or decision of the case.

when martinis can contain microphones disguised as olives, when tie clasps can broadcast, and concave microphones can pick up conversation hundreds of feet away, little validity can be attached to such a concept. In recognition of this change in circumstance, the Court, in *Lopez* and *Osborn* focused on the problem of electronic surveilance as it now exists and framed opinions that recognized present day circumstances.

The instant case seeks to turn back the clock and impose 1928 law on a 1967 defendant.

It is manifest that the facts of *On Lee* and the instant case are identical in every significant respect: Specifically, (1) the informer in both cases was a prior acquaintance; (2) in both cases, the informer had been convicted of violations of the very law he was assisting the government in enforcing; (3) hidden microphones were used in both cases (as well as a tape recorder in the instant case); (4) in both cases the hidden electronic devices were utilized without any specificity as to the evidence sought to be obtained—in petitioner's case as a response to "rumors" and in *On Lee* in response to vague charges by an unsavory character that the defendant was part of an opium ring; (5) in neither case was a magistrate consulted; and (6) no attempt was made in either case to comply with even minimal Fourth Amendment standards.

In the opinion below the Court relied only upon *On Lee* and *Lopez* in disposing of Petitioner's Fourth Amendment argument. That the Court regarded these decisions as controlling is shown by its statement at 370 F. 2d 165:

> Regardless of strongly entertained differences of opinion in this area, both lay and judicial, it all

> boils down to this: the prior decisions require a holding that the use of these recording devices did not here violate appellant's Constitutional rights.

Lopez is distinguishable from the case at bar since the agents not only concealed tape recorders but utilized hidden microphones as well; and defendant could not conceivably be held to have waived his rights as to the agents lurking three blocks from his bed room, monitoring his conversations with Kennington. Thus, the conclusion is inexcapable that the Court felt *On Lee* was controlling authority.

By the Court's own admission, the case against Petitioner is extremely weak. The Court stated at 370 F. 2d 163:

> As to the sufficiency of the evidence, the case would be exceedingly close, if not clearly reversible, had it not been for a highly incriminating statement made by the appellant on April 22, 1963, of which indisputable proof was preserved by the use of a tape recording.

It would contribute nothing to detail the evils of indiscriminate electronic surveilance. The Court is well aware of the magnitude of the problem. The instant case, however, is a classic example of the danger presented by this activity. Petitioner was convicted and his conviction upheld on the strength of one sentence. It is interesting to speculate how much weight that one sentence would have been accorded had not "indisputable proof" of it been preserved "by the use of a tape recorder." 370 F. 2d at 163.

As grievous as will be the consequences to Petitioner if his petition fails, this case involves far more than the

freedom of one man. This case, or some other in the future, will establish a standard which will determine whether the people will be secure in their homes or whether they become hagridden and furtive, ". . . gathering in bathrooms to conduct whispered discussions of intimate affairs, hoping thus to escape the reach of the sending apparatus." *United States v. On Lee*, 193 F. 2d 306, 317 (2d. Cir. 1951), *aff'd*, 343 U.S. 247 (1952).

2.

The use of secret microphones and midget tape recorders by federal agents violated defendant's right to fair play and substantial justice as traditionally defined and enforced by the federal judiciary.

The use of hidden electronic devices by federal agencies in investigations leading to criminal prosecutions has been condemned in recent times by no less of a figure than the President of the United States. As reported in The Atlanta Constitution on Friday, July 16, 1965, Mr. Johnson has issued specific orders to all federal agency heads that there is to be no wire tapping or electronic snooping except when related to national security.

This order by the President of the United States is a clear and unequivocal statement of the policy of the executive branch toward the use of hidden electronic devices in investigations leading to criminal prosecutions. Said order establishes a standard of fair play below which no federal agent may go in acquiring evidence against a prospective defendant. In the case at bar, that standard was repeatedly and flagrantly violated.

The United States courts have traditionally had the power and duty to supervise the administration of criminal justice and of establishing civilized standards of procedure and evidence. As the Supreme Court stated in *McNabb v. United States*, 318 U.S. 332, 340-41 (1943):

> Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized "as due process of law" and below which we reach what is really trial by force . . .
>
> The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . this court has from the very beginning of its history formulated rules of evidence to be applied in federal criminal prosecutions . . . And in formulating such rules of evidence for federal criminal trials, the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance.

The court in *McNabb* held that the failure to take the defendant therein before a judicial authority within a reasonable time following his arrest violated the standards formulated and applied in the trial of federal criminal cases. The court admitted that there was no specific provision governing the actions of federal law enforcement officers which would apply to this case but stated that it excluded the defendant's confession out

of a respect for the policy which underlies Congressional legislation in this area.

Rule 26 of the Federal Rules of Criminal Procedure provides in pertinent part:

> The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these Rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

This Rule specifically gives this and every other Federal court the power to meet the needs of changing times and the evolution of the common law by altering or amending the standards of admissibility of evidence when "in the light of reason and experience" that need arises. This court has the power to recognize the changes which have taken place with the advent of modern electronics technology and the vastly increased use of secret electronic devices in investigating criminal defendants. The President of the United States has enunciated the policy of the executive branch of the Government and thus has set a standard of fairness below which no federal agent may stoop. The courts of the United States are the only agencies which have the power and the duty to enforce that standard. The President's order would benefit the citizens of the United States little if the federal courts admit evidence obtained in direct contradiction of that order.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ ELLIS G. ARNALL
Attorney for Petitioner,
Joseph H. Hurst

CERTIFICATE OF SERVICE

I, Ellis G. Arnall, one of the attorneys for Joseph J. Hurst and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 17th day of March 1967, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (and Appendices thereto) by mailing copies thereof, correctly addressed with first class postage prepaid to the following, as required by Supreme Court Rule 33:

Floyd M. Burford
United States Attorney
Macon, Georgia 31202

Hon. Thurgood Marshall
Solicitor General of the United States
Department of Justice
Washington, D.C. 20425

/s/ ELLIS G. ARNALL
ELLIS G. ARNALL
Attorney for Joseph J. Hurst

March 17, 1967

APPENDIX A

JUDGMENT OF THE COURT BELOW,
DATED JANUARY 5, 1967

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22399

JOSEPH J. HURST,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(January 5, 1967.)

Before BROWN and COLEMAN, Circuit Judges, and GARZA, District Judge.

COLEMAN, Circuit Judge: Appellant stands convicted by a jury of conspiracy to violate various sec-

tions of the Internal Revenue Code relating to non-tax-paid whiskey and he was also convicted on one of three counts charging substantive violations of the same statutes. There had been a prior trial of the case in which he was convicted on the conspiracy count and the three substantive counts. Because the Government had been permitted to introduce in evidence records dealing with prior offenses, some only charged and others proven, in no way connected with the charges for which defendant was then being tried, these convictions had to be reversed, 337 F. 2d 678. This Court there held that the evidence of conspiracy and substantive violations, although not strong, was sufficient to warrant submission to a jury.

On this second appeal the evidence appearing in the trial transcript has been most thoroughly examined. Although the original weaknesses remain, the government was again able to produce enough proof to avoid a court ordered acquittal, especially in view of a particularly incriminating conversation of appellant which took place on April 22, 1963, and which will hereinafter be set forth in detail.

The indictment charged that the appellant conspired with the county sheriff and several professional liquor violators but there was no direct proof of a specific conspiratorial agreement. Appellant was never placed personally in the act of possessing any whiskey, transporting any whiskey, or taking pay for any whiskey. At the insistence of government agents, he once took $100 for the requested purpose of delivering it to the sheriff and the proof conclusively shows that he did so deliver it instead of keeping it for himself. The pursuit, investigation, and apprehension of appellant

was accomplished by several agents of the Treasury Department, Alcohol Tax Unit, in which the key role was played by an undercover informer. This informer had previously been personally acquainted with appellant in regard to the illicit liquor business, as will later be seen in connection with another point, and had been convicted of liquor violations.

By and large, the proof revolved around the sayings and doings of these participants, the pursuers and the pursued. A detailed recitation of the trips made by informer and agents to appellant's home, conversations between them, telephone calls, automobile journeys made in search of whiskey, and other lesser elements in this otherwise routine liquor case would require copying the trial record. The extensive details would constitute no contribution to jurisprudence in this particular field. We note that appellant never attempted at any time to make contact with the informer or the agents. They always sought him out, mostly at his home, generally at night, and after he had gone to bed. Entrapment, however, was not raised as a defense.

As to the sufficiency of the evidence, the case would be exceedingly close, if not clearly reversible, had it not been for a highly incriminating statement made by the appellant on April 22, 1963, of which indisputable proof was preserved by the use of a tape recording.

This recording was made without the knowledge of the appellant and later produced on the witness stand. It was secured in the following manner:

About 9 o'clock on the night of April 22, 1963, the informer and an agent went to the home of appellant, where they found him sprinkling the yard. The informer asked the appellant, "Did you ever find me any stuff?" Appellant thought a minute and replied, "Bennett ought to be back up. Let me get my shirt and I'll take you out there." The station wagon, driven by the informer, had a midget tape recorder on the front seat, concealed in a package similar to a shoe box. While appellant was going for his shirt, the agent turned this recorder on. Of course, appellant was not warned and did not know that the conversation, on the way to Bennett's, was being recorded. No liquor was found there. The agent testified that while on the way out they were discussing the matter of protection for the liquor business in Quitman County, and appellant said, "Hammond can't guarantee you anything. *I can guarantee you, so long as the sheriff and I are the only ones that know about it, nothing will happen to you in Quitman County.*"

While he was on the witness stand, the agent physically identified the tape (recording) but it was not played at that time. After this witness was excused the United States Attorney announced, "* * our next proposal, next evidence, is to play the recording". He further stated "your Honor please, we have Mr. Jim Weaver here of Columbus, who is in this type of business, operating these machines, I know nothing about them; and I asked him to play the tape for us located in the box identified as G-3".

Counsel for the appellant objected to the use of the tape "because it's not a complete record of what was said at that time. If the court reporter can't under-

stand it after several attempts to play it, we submit that it is incomplete and inaudible and, therefore, may be deceptive and prejudicial in this case, and we object to its playing on that ground".

Appellant further suggested that the tape ought not to be played because it simply covered evidence already given by two government witnesses, and, therefore, would add nothing to the trial.

The court overruled the objections and allowed tape recording G-3 to be "played to the jury".

The court reporter's transcript of the recording shows that many extraneous, irrelevant, and probably prejudicial things were discussed by appellant, informer, and agent, such as the activities and unreliability of another alleged liquor operator, how the sheriff had taken care of that operator, how bootlegger Bennett had given appellant a mighty good gallon the other night, about how Bennett had had five big stills "cut down", how the informer had had an automobile confiscated from him, about the legalization of mixed drinks in Georgia, during which time appellant stated that although he was a Legislator from a dry county he could vote wet, that they might not pass "that dam thing", and if "that crowd will put the money in there like they promised to, it could pass. I think they've got the dam money, to tell you the truth". *None of this was objected to in any fashion.*

The recording, in the voice of the appellant, then revealed the following conversation about "protection" in Quitman County:

"Informer. He (meaning Hammond) wanted to guarantee me to the Russell County line for 50¢ extra

and I agreed to do it, but you know how his guarantee was, don't you?

Appellant. Hell, his guarantee was worthless. He wouldn't—

Informer. I wouldn't believe him, nothing he says.

Appellant. He's got no way to guarantee it. Couldn't guarantee anybody out of the yard.

Informer. That's right. But you know whenever—

Appellant. *I can guarantee you in Quitman County if don't nobody know it but the sheriff".*

It must be pointed out that on quite a number of other occasions the informer or agents, were secretly equipped with concealed microphones or transmitters which broadcast conversations to other agents lurking nearby. Appellant vigorously criticizes this procedure, although the conversations obtained in that manner are not so damagingly incriminating as the one taken down by the secret tape recording.

On appeal, an effort is made to raise Constitutional questions under the Fourth, Fifth, and Sixth Amendments. Appellant says that, although there was no objection below, the admission of the evidence as above obtained was plain error under F.R.C.P. Rule 52(b).

On Lee v. United States, (1952) 343 U. S. 747; 72 S. Ct. 967; 96 L. Ed. 1270, was a case in which the defendant made damaging admissions to a trusted "friend" who, unknown to him, was an undercover agent. This undercover agent carried a concealed microphone which allowed another agent, outside the building, to overhear the conversation. This agent was

allowed to testify to what he heard. The Supreme Court, by a divided vote, held that this procedure did not violate the Fourth Amendment.

Again by a divided vote, the Supreme Court in *Lopez v. United States*, (1963) 373 U. S. 427; 83 S. Ct. 1381; 10 L. Ed. 2d 462, held that a wire recording of a conversation between a defendant and a government agent, taken during an attempt to bribe that agent, was properly admitted in evidence; that the secret making of the recording did not violate petitioner's rights under the Fourth Amendment; and that the Supreme Court would not prevent the introduction of the recording by the exercise of its supervisory powers, there being no improper conduct by federal officials. There was a powerful dissent, concurred in by three Justices. It will be noted that in *Lopez* the defendant knew he was speaking with an officer of the United States.[1]

On Lee and *Lopez* were decided on Fourth Amendment grounds. Apparently no Fifth Amendment question was raised. This question, however, has been before United States Courts of Appeals in other circuits. In *Todisco v. United States* (9 Cir. 1961), 298 F. 2d 208, cert. denied, 368 U. S. 989; 82 S. Ct. 602; 7 L. Ed. 2d 527, defendant was convicted of an attempt to bribe an internal revenue agent. Without the defendant's knowledge a conversation between the defendant and the agent was recorded by an agent using a

1 After this opinion had been written but not published, the Supreme Court granted certiorari in *Osborn v. United States*. Since *Lopez v. United States* appeared to be directly involved, we withheld further action pending the Supreme Court decision. That decision, rendered December 12, 1966, prompts no change in the views already agreed upon and herein expressed, *Osborn v. United States*, No. 29, October Term, 1966, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____, 35 L.W. 4067.

miniature radio transmitter. The court held that there was no merit to a Fifth Amendment objection because * * * "appellant was not confessing to a crime, he was committing one. Even if there were self incrimination, it was wholly voluntary".

United States, Appellee, v. Beno, Defendant-appellant, (2 Cir. 1964), 333 F. 2d 669, was a case in which a tape recording of conversations with the defendant, secretly taken, was played to the jury. The Court held Fifth Amendment contentions to be without merit, that the words constituted the commission of the crime itself, the defendant was at that moment violating the law, that if the witness could testify as to the dialogue between the defendant and himself then there would seem to be no reason why the recorded version, far more accurate, could not be introduced and played to the jury, citing *United States v. Kabot,* (2 Cir. 1961), 295 F. 2d 848, cert. denied, 369 U. S. 803; 82 S. Ct. 641; 7 L. Ed. 2d 550.

Regardless of strongly entertained differences of opinion in this area, both lay and judicial, it all boils down to this: the prior decisions require a holding that the use of these recording devices did not here violate appellant's Constitutional rights.

The Supreme Court has specifically declined to exercise its supervisory powers to prohibit the use of testimony obtained as here by concealed microphones. Consequently, we do not feel that this court should consider such a supervisory rule.

As to the use of the secret microphones, transmitters, and recording machines, we must emphasize that appellant's statements, there recorded or there

overheard, were not recitations of past crimes. At the time of utterance and recordation they were elements, or likely elements, of a crime in the course of commission. Appellant was not then under detention or compulsion of any kind. He was acting of his own free will and accord, although under the mistaken belief that he was dealing with "friends" instead of government agents. He had not been formally charged with any offense nor taken into custody. This was not an *Escobedo* or *Massiah* situation. We perceive no invasion of appellant's Constitutional rights against self incrimination under the Fifth Amendment or right to counsel under the Sixth Amendment.

II

An important question is seriously pressed with reference to the admission of testimony concerning an occurrence which took place about ten months before the earliest accusatorial date laid in the indictment. At the very outset of the trial, over strenuous objection from the defendant, the government was allowed to offer proof that on March 8, 1962, the informer, Kennington, was caught redhanded in the transportation of thirty-two gallons of whiskey, that he was tried the same date at a store belonging to the accused sheriff, and fined $400. It was further shown that appellant later drove up in the company of Hammond (the man later named in the tape recording), after which he sent word, by Hammond, to the arresting *state* officer "to bring that car and whiskey back right away". It was promptly done. By the intervention of this appellant, Kennington got his vehicle and whiskey back, but was promptly arrested again as soon as he

crossed the river out of Georgia and into Alabama. The next day appellant went to Eufaula and signed Kennington's appearance bond.

If this appellant had been on trial for some crime other than violating and conspiring to violate laws relating to non tax-paid whiskey, and if the admissibility of this proof depended on "background purposes, and for that purpose only", (the reason given by the trial court for admitting it) there would be clear necessity for reversal, *Michelson v. United States*, 335 U. S. 469; 69 S. Ct. 213; 93 L. Ed. 168. It was there said:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt". [Citations omitted].
>
> "The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime".
>
> [Exceptions: when a prior crime is an element of the later offense or the establishment of fraudulent intent is involved.]
>
> "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge".

The decisive factor on that point in this case is that *the government's proof did not stop with the introduction of this testimony.* Later proof described what took place on April 22, 1963, when the appellant voluntarily made the trip to bootlegger Bennett's. There the conversation dealt squarely with the protection activities of that same Hammond who first went with the appellant to the sheriff's store and who then delivered the appellant's message to the state officer which resulted in the return of the automobile and the whiskey. Moreover, appellant was then and there talking directly with the same Kennington who lost the whiskey and then recovered it by "order" of the appellant. It might have been better trial practice for the government to have introduced the proof of what occurred on April 22, 1963 before presenting the testimony as to what happened on March 8, 1962. In any event, the case was submitted to the jury on *all the proof* and we do not find reversible error in this regard. *Weiss v. United States,* 122 F. 2d 675 (5 Cir. 1941), cert. denied 314 U. S. 687; 62 S. Ct. 300; 86 L. Ed. 550 (1942), rehearing denied 314 U.S. 716; 62 S. Ct. 478; 86 L. Ed. 570 (1942).

We note the decision of this court in *Roe v. United States,* (5 Cir. 1963), 316 F. 2d 617,623, in which it was said:

> "For the law must protect against the human tendency to conclude that birds, like words, are frequently judged by the company they keep—*noscitur ex socio.* But despite the adverse implications—often spectacular and occasionally inflammatory—from proof showing commission of some crime other than the

> one being tried, the law does not accord an automatic immunity from such evidence. Care must, of course, be taken to keep such evidence in proper bounds. If it has no connection with any elements of the offense being tried, it may not be introduced merely to cast the defendant in a bad light. In the words of Judge Hutcheson, it may not be used merely to 'give a dog an ill name and hang him'. *Olinger v. Commissioner*, 5 Cir. 1956, 234 F. 2d 823,824; *Goldberg v. Commissioner*, 5 Cir. 1956, 239 F. 2d 316,321. But it is essentially a question of relevance. And it is now clear that evidence that is relevant to prove one crime does not become inadmissible because it also proved another."

Able counsel for the appellant have striven most diligently in his behalf. In addition to the points already disposed of they complain of certain instructions to the jury and the failure to give others. A careful reading of the charge reveals no reversibly prejudicial inclusion or omission. The other specifications of error have been duly considered but cannot be sustained.

The Judgment of the District Court is

AFFIRMED.

ORDER OF THE COURT BELOW,
DATED FEBRUARY 16, 1967

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22399

JOSEPH J. HURST,

Appellant,

versus

UNITED STATES OF AMERICA

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(February 16, 1967.)

ON PETITION FOR REHEARING

Before BROWN and COLEMAN, Circuit Judges, and GARZA, District Judge.

PER CURIAM: Emphasizing our concession that this is an exceedingly close case on the facts [but nevertheless one for the jury] appellant strongly petitions for rehearing on the following grounds:

(1) Although the defense of entrapment was not raised in the Court below the record establishes it as a matter of law; (2) the recorded conversation was no proof of conspiracy because the conspiracy, if any, there recited was with Government agents only; (3) the situation here was not such as that approved in *Osborn v. United States;* and (4) the recorded conversation, properly interpreted, was no proof of a conspiracy with the sheriff.

Judged within the four corners of the facts, as well as the reasoning of the original opinion, we are of the view that the Petition for Rehearing is not well taken and must be

DENIED.

APPENDIX B

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. CONST. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

RULES INVOLVED

FED. R. CRIM. P. 26:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise

provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

FED. R. CRIM. P. 52(b)

Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.